

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
BEEHIVE PETITION FOR	)	WC Docket No. 10-36
DECLARATORY RULING	)	

REPLY COMMENTS OF THE BEEHIVE TELEPHONE COMPANIES

Beehive Telephone Co., Inc. and Beehive Telephone Co. Inc. Nevada (collectively “Beehive”), by their attorney, hereby replies to the comments filed by Sprint Communications Company L.P. (“Sprint”) and AT&T Inc. (“AT&T”) regarding the amendment to Beehive’s petition for declaratory ruling pending in the above-captioned proceeding.

Sprint complains that Beehive “provide[d] no explanation of why it seeks the rulings it does or what it sees as their implications.”<sup>1</sup> As it explained, however, Beehive amended its petition for a declaratory ruling in the hopes that by simplifying the request it could expedite the issuance of an abbreviated ruling last month.<sup>2</sup> That possibility was foreclosed when the Wireline Competition Bureau (“WCB”) solicited a second round of comments on the amended petition despite the fact that Beehive merely narrowed the issues already before the Commission.<sup>3</sup> Nevertheless, Beehive remains hopeful that the WCB can issue a ruling in relatively short order.

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<sup>1</sup> Comments of Sprint Communications Company L.P., WC Docket No. 10-36, at 4 (Apr. 5, 2010) (“Sprint Comments”).

<sup>2</sup> See Email from Russell D. Lukas to Sharon Gillett (Mar. 13, 2010).

<sup>3</sup> To analogize to the notice requirement for rulemakings under the Administrative Procedure Act (“APA”), the requirement is satisfied when the Commission’s final rule is the “logical outgrowth” of the rule set forth in the notice of proposed rulemaking. See *Covad Communications Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006). A final rule qualifies as a logical outgrowth if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period. See *CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076, 1079-80

Beehive has specified the reasons why the Commission should exercise its authority under the APA to issue a declaratory ruling on the applicability of § 207 of the Communications Act of 1934, as amended (“Act”).<sup>4</sup> Those reasons need not be repeated. But it should be noted that the issuance of the requested declaratory ruling would no more “interject” the Commission into litigation<sup>5</sup> than when it files a brief as an amicus curiae. *See, e.g., Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 689 n.10 (1998). Moreover, courts — including the Tenth Circuit — have recognized that the Commission is primarily responsible for the interpretation and implementation of the Act, including § 207. *See TON Services, Inc. v. Qwest Corp.*, 493 F.3d 1225, 1243-45 (10th Cir. 2007); *Greene v. Sprint Communications Company*, 340 F.3d 1047, 1052-53 (9th Cir. 2003). The 10th Circuit undoubtedly will welcome the Commission’s ruling as to the applicability of the election-of-remedies provision of § 207. And the district court apparently envisioned that Beehive would obtain such a ruling<sup>6</sup> since the parties were essentially being sent back to the Commission.<sup>7</sup>

AT&T claims that Beehive has offered “no precedent or logic” to support its “uniquely-

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(D.C. Cir. 2009). In this case, Beehive initially sought a much broader ruling on the same issues that were the focus of its amended petition. For as Sprint stated, “Beehive does not even appear to ‘amend’ the relief that it is seeking in its declaratory ruling petition,” since its amended request seeks “essentially the same relief” that it initially sought. Sprint Comments at 2. Thus, Sprint, AT&T and others were given the opportunity to comment on the issues during the initial comment period. There was no need for the WCB to release a second public notice, especially since Beehive served copies of its amendment on all the interested parties. Those parties were on notice of the amendment and were free to comment on Beehive’s pared-down request.

<sup>4</sup> *See* Petition for Declaratory Ruling, WC Docket No. 10-36, at 23-25 (Feb. 2, 2010) (“Petition”).

<sup>5</sup> Sprint Comments at 1.

<sup>6</sup> *See* Reply to Comments on Petition for Declaratory Ruling, WC Docket No. 10-36, Attachment 1 at 37-39 (Mar. 11, 2010). Attachment 1 consists of the reporter’s transcript of the motions hearing before the court on October 6, 2009, which Beehive will refer to as “Tr.”

<sup>7</sup> *See* Tr. 45.

held view” that the election-of-remedies provision of § 207 recognizes a distinction between complaints that seek declaratory relief and those that seek damages.<sup>8</sup> That claim is simply not true. Beehive provided both precedent and logic to support its view that § 207 explicitly relates to the recovery of damages.<sup>9</sup> That view is hardly unique to Beehive considering it reflects the plain meaning of §§ 206-209 of the Act<sup>10</sup> and is shared by the courts and the Commission.

The Supreme Court reviewed the language and history of §§ 206 and 207, as well as their predecessors, §§ 8 and 9 of the Interstate Commerce Act (“ICA”), and concluded that the clear purpose of § 207 is to allow persons injured by violations of the Act “to bring federal-court damages actions.” *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, 53 (2007). The text of § 207, as well as its title (“Recovery of Damages”), makes it clear that the provision “relates to a ‘suit for the recovery of damages’ ... and grants the aggrieved party the choice of administrative or judicial remedies for those damage claims.” *RCA Global Communications, Inc. v. Western Union Telegraph Co.*, 521 F. Supp. 998, 1005-6 (S.D.N.Y. 1981). Thus, a prior invocation of the Commission’s “remedial authority” does not preclude a federal court damages claim under § 207 if the plaintiff did not present its claim for damages to the Commission. *Id.*

That there is a dispositive distinction between complaints for damages and those for other forms of relief is evident from the fact that district courts “have allowed suits to go forward, notwithstanding parallel proceedings before the FCC ... where the FCC complaints have sought only equitable relief, in contrast to claims for money damages in federal court.” *Digitel, Inc. v.*

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<sup>8</sup> Comments of AT&T Inc. on Amendment to Petition for Declaratory Ruling, WC Docket No. 10-36, at 2 n.4 (Apr. 5, 2010) (“AT&T Comments”).

<sup>9</sup> See Petition at 8-12 & nn.36, 37.

<sup>10</sup> See *id.* at 6-7.

*MCI WorldCom, Inc.*, 239 F.3d 187, 191 (2d Cir. 2001). For example, a federal court damages claim was not barred under § 207 by the fact that the plaintiffs previously filed an informal complaint with the Commission for injunctive relief. *See Cancall PCS, LLC v. Omnipoint Corp.*, 2000 WL 272309, at \*10 (S.D.N.Y. 2000).

The Commission also has recognized the distinction. In the first case to address the election-of-remedies provision of § 207, the Common Carrier Bureau (“CCB”) found that § 207 was based on the election of forum provision of the ICA “which was enacted by Congress ... to preclude double recovery of damages or attempts to do so for the same cause of action.” *Fairmont Telephone, Inc. v. Southern Bell Telephone & Telegraph Co.*, 53 Rad. Reg. 2d (P&F) 639, 642 (CCB 1983). Despite the fact that the legal issues issued raised by the complaint were “virtually the same, if not identical, with those of the lawsuit pending before the court,” the CCB held that the complaint, as amended to delete its claim for damages, was not barred by § 207 since the complainant was not seeking a double recovery of damages. *See id.* In the cases that followed, the Commission focused on whether the judicial and administrative complaints involved duplicative claims for damages:

- In *Long Distance/USA, Inc. v. The Bell Telephone Co. of Pennsylvania*, 7 FCC Rcd 408, 410 n.30 (Com. Car. Bur. 1992), *review denied*, 10 FCC Rcd 1634 (1995), the CCB found that § 207 did not bar the complaints, because “the complainants are not attempting to pursue identical issues both here and in court. Instead, they are asking us to determine the issue of liability and the court to determine the issue of damages.”
- In *Comsat Corp. v. IDB Mobile Communications, Inc.*, 15 FCC Rcd 7906, 7916-17 (Enf. Bur.), *review denied*, 15 FCC Rcd 14697 (2000), the Enforcement Bureau (“EB”) construed § 207 as follows:

The text of [§] 207, as well as its title ... indicate that the focus of the provision is the nature of the relief sought by the plaintiff, rather than the legal theories in which the plaintiff’s claims are dressed. We also note that the self-evident purposes of [§] 207, avoiding duplicative litigation and maximizing judicial economy, would be ill-served by allowing a plaintiff to litigate a damages claim to completion in one forum, then file a

separate claim seeking the same relief (even if under different legal theories) in a separate forum.

The EB found that § 207 precluded the complainant from maintaining its complaint because it had “previously elected to seek in a federal district court the same damages, arising from the same transaction.” 15 FCC Rcd at 7918.

- In *Comsat Corp. v. Stratos Mobile Networks (USA), LLC*, 15 FCC Rcd 22338, 22350-51 (EB 2000), *review denied*, 16 FCC Rev. 5030 (2001), the EB found that § 207 barred a complaint because the complainant “sought in court the *very same* damages” it sought from the Commission.

Beehive initially requested that the Commission issue a declaratory ruling that only a claim for damages caused by a carrier’s violation of a provision of the Act can trigger an election of remedies under § 207.<sup>11</sup> The Commission clearly agrees with Beehive’s construction of the statute. It has held that § 207 “gives any person the option of pursuing claims for damages against common carriers based on alleged violations of the Act either at the Commission or before a federal district court of competent jurisdiction,” but “such person shall not have the right to pursue both such remedies.” *Implementation of the Telecommunications Act of 1996*, 12 FCC Rcd 22497, 2501 & n.12 (1997). Thus, under § 207, “parties looking to recover monetary damages are free to weigh the advantages of bringing their claims before a federal district court against the benefits of proceeding under the Commission’s expedited complaint procedures.” *Id.* at 22501-2.

In view of the foregoing, the WCB must reject AT&T’s astonishing claim that the “case law is clear” that Beehive’s informal complaint “triggered the application of [§] 207, which is broadly framed to prevent parties from gaming the system and pursuing relief both from the Commission and federal courts.”<sup>12</sup> Not even the district court in this case departed so far from

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<sup>11</sup> See Petition at 7-12.

<sup>12</sup> AT&T Comments at 2. The WCB must also reject AT&T’s contention that “[i]t cannot be disputed that Beehive elected, quite deliberately, to use the Commission’s complaint procedures

the plain language of § 207. If it intended to broadly frame § 207 to prevent a party from pursuing any form of relief from the Commission and a federal court, Congress would not have specified that § 207 applied to the “[r]ecovery of [d]amages” and limited its application to district court “suit[s] for the recovery of damages” for which a common carrier may be liable under the provisions of the Act. 47 U.S.C. § 207. On that obvious note, Beehive turns to its four requests for abbreviated declaratory rulings.

1. Beehive asks the WCB to confirm the holding of *U.S. TelePacific Corp. v. Tel-America of Salt Lake City, Inc.*, 19 FCC Rcd 24552 (2004), and the resulting Commission policy of dismissing complaints without prejudice that purport to allege a violation of § 201(b) of the Act, but state “an action for recovery of unpaid access charges allegedly due under the terms of a federal tariff.” *Id.* at 24555. Beehive requested that its informal complaint be dismissed by the EB’s Market Disputes Resolution Division (“MDRD”) without prejudice under the *U.S. TelePacific* policy, if the MDRD was disinclined either to mediate the dispute or issue a declaratory ruling.<sup>13</sup> The MDRD did not grant Beehive’s request for relief under *U.S. TelePacific*.<sup>14</sup> If the WCB confirms the *U.S. TelePacific* policy, Beehive will be able to ask the Tenth Circuit to draw the reasonable inference that the MDRD did not follow the policy because it determined that the informal complaint *did not state an action for recovery of unpaid access charges*. Hence, Beehive did not ask the Commission for the same remedy that it subsequently sought from the district court.

2. Beehive’s second requested ruling may be a “truism,” but it is not improper or

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to resolve its traffic pumping dispute with Sprint.” *Id.* Beehive can and has disputed that contention. *See* Amendment to Petition for Declaratory Ruling, WC Docket No. 10-36, Declaration of Russell D. Lukas, at 7 (¶ 26) (Mar. 13, 2010) (“Lukas Decl.”).

<sup>13</sup> *See id.* at 12-13 (¶ 42), 49, 53.

<sup>14</sup> *See id.* at 55-56.

unnecessary.<sup>15</sup> Confirmation that § 208(a) prohibits the Commission from dismissing a complaint at any time “because of the absence of direct damage to the complainant”<sup>16</sup> will conduce to the termination of the uncertainty exhibited by the district court in this case.

Beehive’s informal complaint did not include a claim that Beehive had been damaged by Sprint’s conduct.<sup>17</sup> Nevertheless, Sprint represented directly to the court that Beehive claimed to be damaged and that was the basis of its informal complaint.<sup>18</sup> Despite repeated assurances that the informal complaint did not include a claim that Beehive had been damaged by Sprint’s conduct,<sup>19</sup> the court inferred that Beehive had claimed to have been damaged by Sprint:

THE COURT: But you wouldn’t expect a person to be bringing a Complaint if the person didn’t feel the person was damaged. Why else would you make a complaint of any kind, anywhere, from when you were a little kid before your mother”? You know, “My brother hit me.”

You don’t complain unless you feel you’ve been injured or damaged. Isn’t that fair?<sup>20</sup>

When it announced its decision to dismiss Beehive’s collection suit, the court explained, “I’m not persuaded by the argument that there were efforts made by Beehive before the FCC to point out that it was not making a damages claim, but it was a party claiming to be damaged by a common carrier.”<sup>21</sup> There was no basis in fact for Sprint’s representation, and the court’s conclusion, the Beehive was before the Commission “claiming to be damaged” by a common carrier. 47 U.S.C. § 207. The grant of Beehive’s second request for a ruling will preclude the

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<sup>15</sup> AT&T Comments at 4.

<sup>16</sup> 47 U.S.C. § 208(a).

<sup>17</sup> See Lukas Decl. at 8 (¶ 27), 10 (¶ 32), 16-23, 52.

<sup>18</sup> See Tr. 6, 7.

<sup>19</sup> See *id.* at 13, 22, 23, 26, 27.

<sup>20</sup> *Id.* at 24.

<sup>21</sup> *Id.* at 35.

inference that Beehive was so claiming.

Based on the statutory proviso that complaints cannot be dismissed because of the absence of direct damage to the complainant, the Commission has held that § 208 “has its own standing requirement, which ... explicitly confers standing upon ‘any person’ to complain of alleged wrongdoing by a common carrier, without regard to injury suffered or direct interest in the matter.” *Philippine Long Distance Telephone Co. v. International Telecom, Ltd.*, 12 FCC Rcd 15001, 15005-6 (1977). Thus, in *American Message Center v. Sprint Communications Co. L.P.*, 8 FCC Rcd 5522, 5523 (1993), *petition for review denied*, *American Message Center v. FCC*, 50 F.3d 35 (D.C. Cir. 1995), the Commission held:

The fact that AMC was not a customer of Sprint does not negate AMC’s standing to file this complaint challenging the lawfulness of Sprint’s common carrier practices, even in the absence of direct or indirect injury. AMC has, as would any member of the public, a valid interest in ascertaining through this [§] 208 proceeding whether Sprint is ... engaging in unjust, unreasonable, or discriminatory practices in providing common carrier services.

Like any member of the public, Beehive had standing to challenge the lawfulness of Sprint’s self-help practices without regard to whether it had been damaged by those practices. Indeed, Beehive was seeking a ruling that would set a precedent that would also protect similarly-situated carriers across the country on a going-forward basis.<sup>22</sup> Undersigned counsel informed the MDRD as follows:

I would like the opportunity to respond to Sprint Nextel’s contention that the Commission is without authority to issue a declaratory ruling, or provide declaratory relief, in this case. This matter is of particular significance since the Beehive Telephone Companies are far from the only carriers that have been subjected to Sprint Nextel’s self-help practice/policy of not paying tariffed access charges. Indeed, they are not my only clients that are in the unenviable position of having their access service charges ignored by Sprint Nextel. So the issue is

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<sup>22</sup> See Lukas Decl. at 5 (¶ 19).

going to keep coming up.<sup>23</sup>

The language of § 208(a) that precludes the dismissal of a complaint because of the absence of direct damage to the complaint, and the Commission's requirements for standing to file a complaint under § 208(a), allowed Beehive to file its informal complaint without claiming to have been damaged by Sprint's conduct. Beehive's second requested ruling will support its argument that the statute precluded the court from inferring that Beehive had claimed to have been damaged by Sprint's conduct despite its representations to the contrary. That the matter is subject to controversy within the meaning of 47 C.F.R. § 1.2 is evident from Sprint's insistence that Beehive's informal complaint did allege that it was damaged by Sprint's conduct.<sup>24</sup>

3. Beehive's third and fourth requested rulings simply "ask the Commission to rule on what Beehive's informal complaint said."<sup>25</sup> There ought not to be a need for such rulings because, as AT&T notes, the informal complaint should "speak for itself."<sup>26</sup> However, Sprint has not allowed the complaint to speak for itself. Sprint's persistent misrepresentation of what was actually stated in the informal complaint as forced Beehive to ask for the WCB's reading of the relevant papers.

Sprint began by representing to the court that Beehive's complaint "sets forth the same facts and seeks the same relief" that Beehive sought before the Commission.<sup>27</sup> As noted above, Sprint subsequently told the court that Beehive claimed to be damaged and that was the basis of

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<sup>23</sup> Lukas Decl. at 5 (¶ 20), 42. By February 10, 2009, Sprint was withholding payment of approximately \$100 million of access service charges nationwide based on its unadjudicated contention that the charges were the product of so-called "traffic pumping."

<sup>24</sup> See Sprint Comments at 3.

<sup>25</sup> AT&T Comments at 4.

<sup>26</sup> *Id.*

<sup>27</sup> Opposition of Sprint Communications Company L.P., WC Docket No. 10-36, Attachment 3 at 2 (Mar. 1, 2010).

its informal complaint.<sup>28</sup> Now, Sprint stoops to make the following mischaracterization:

The precise reason Beehive filed its informal complaint with the Commission was to obtain a ruling that Sprint's conduct violated the Act and as a result damaged Beehive. Indeed, Beehive's informal complaint listed the amounts that Sprint withheld that Beehive says Sprint should have paid. Informal Complaint at 5. Upon reviewing Beehive's informal complaint, the district court had no difficulty in concluding that Beehive was an entity claiming to be damaged by Sprint's conduct, something Beehive did not contest in court.<sup>29</sup>

Allowed to speak for itself, page 5 of Beehive's informal complaint does not say that Beehive was damaged by Sprint's conduct. In fact, neither the word "damaged" nor "damages" appears on page 5.<sup>30</sup> Nor did Beehive allege that it had been damaged by listing the "amounts that Sprint withheld." It simply provided a table identifying Sprint's boilerplate billing disputes by bill date, amount disputed, dispute date, and the date of disposition.<sup>31</sup> The "precise reason" that Beehive provided that information was to support its allegation that Sprint did not submit "good faith" billing disputes as required by Beehive's tariff.<sup>32</sup> In fact, Sprint made the following frivolous claim to dispute every bill that Beehive issued over a five-month period:

Sprint has grave concern regarding the nature of the terminating traffic billed, given the extraordinary increase in volume related to past demand. Our regulatory and legal teams are in the process of performing some analysis of the traffic, -disputing terminating charges.<sup>33</sup>

According to its boilerplate claim, Sprint had "grave concern" for five months regarding the nature of the traffic that Beehive allegedly was terminating, during which time Sprint's "regulatory and legal teams" had been analyzing the traffic without reaching a conclusion.

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<sup>28</sup> See *supra* note 18 and accompanying text.

<sup>29</sup> Sprint Comments at 3.

<sup>30</sup> See Lukas Decl. at 20.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.* at 18-21.

<sup>33</sup> See *id.* at 18.

Beehive was forced to deny that frivolous claim seven times on the grounds that it was unrelated to the facts, the law, or the terms of Beehive's access tariff.<sup>34</sup> Beehive alleged that Sprint's repetitive, baseless claims were evidence that it had engaged in an unjust and unreasonable practice in violation of § 201(b) of the Act.<sup>35</sup> However, the relief Beehive sought from the Commission was a declaratory ruling, which is clearly not "functionally equivalent to a request for damages."<sup>36</sup>

AT&T employs its "functionally equivalent" to a damages claim theory to challenge Beehive's request for a ruling that its informal complaint did not include either an allegation that it was damaged by any conduct for which liability is imposed on carriers under 47 U.S.C. § 206, or a claim for the recovery of damages sustained by such conduct.<sup>37</sup> It reads Beehive's request for a declaratory ruling that Sprint violated § 201(b) and was obligated to pay Beehive's access charges as amounting to a request for damages for the purposes of § 207.<sup>38</sup> Again, Beehive simply never alleged that it was damaged by Sprint's violation of § 201(b) and its informal complaint did not request the Commission to award damages under § 209 of the Act.<sup>39</sup>

Both Sprint and AT&T found that Beehive's collection suit was barred by § 207 based upon their *interpretation* of the claims that were presented to the Commission by Beehive's informal complaint. However, "issues regarding the applicability of § 207 are complex and should not be decided without the participation of the FCC, the agency principally responsible for the enforcement of the ... Act." *Western Radio Services Co. v. Qwest Corp.*, 530 F.3d 1186,

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<sup>34</sup> See Lukas Decl. at 22-23.

<sup>35</sup> See *id.* at 23.

<sup>36</sup> AT&T Comments at 5.

<sup>37</sup> *Id.*

<sup>38</sup> See *id.*

<sup>39</sup> See Lukas Decl. at 16-23, 48-53.

1204 (8th Cir. 2008). That being the case, the Commission is the appropriate body to determine the applicability of § 207 to the claims that were actually presented by Beehive's informal complaint. Since Beehive's third and fourth requested rulings just ask the Commission to confirm what Beehive did or did not allege in its informal complaint, that task can be performed by the WCB under delegated authority. *See* 47 C.F.R. § 0.91.

AT&T's contention that Beehive's request for a declaratory ruling that Sprint violated § 201(b) was equivalent to request for damages for the purposes of § 207 represents a fundamental misunderstanding of the remedies afforded by §§ 206 and 207. Those provisions allow a private party claiming to be damaged by a common carrier to bring suit against the carrier in district court for the recovery of the damages sustained in consequence of the carrier's doing "*any act, matter, or thing*" prohibited by the Act or "*declared to be unlawful.*" *Global Crossing*, 550 U.S. at 52-53 (quoting 47 U.S.C. § 206) (emphasis in original). The plain language of §§ 206 and 207 establishes procedures for a private party to pursue a damages claim in federal court, "but does not establish an independent private right of action for compensation." *North County Communications Corp. v. California Catalog & Technology*, 594 F.3d 1149, 1160 (9th Cir. 2010). Because the private right of action created by §§ 206 and 207 extends only to violations of the Act, *see Greene*, 340 F.3d at 1050, an action for damages will only lie under § 207 to remedy a violation of the Act or a regulation implementing the Act. *See APCC Services, Inc. v. Sprint Communications Co.*, 489 F.3d 1249, 1250 (D.C. Cir. 2007) ("a violation of the regulation at issue is a violation of § 201(b) ... for which a private right of action is authorized by § 207 ... in effect creating a right of action to remedy a violation of the regulation itself"). In short, if a carrier's conduct is prohibited by the Act, or declared to be unlawful by the Commission, §§ 206 and 207 supply the right to sue the carrier for damages caused by its unlawful conduct.

A cause of action for damages for a violation of § 201(b) will lie under § 207 for a common carrier “charge, *practice*, classification, or regulation *that is unjust or unreasonable*.” *Global Crossing*, 550 U.S. at 52-53 (quoting 47 U.S.C. § 201(b)) (emphasis in original). However, only the Commission can determine whether a particular carrier practice constitutes a violation of § 201(b) for which there is a private right to damages under §§ 206 and 207. *See North County*, 594 F.3d at 1158-59. Absent a predicate determination by the Commission that a particular carrier practice violates § 201(b), a party claiming to be damaged by the practice cannot bring a suit against the carrier for the recovery of its damages in federal court under § 207. *See id.* at 1160-61.

In this case, the WCB issued a declaratory ruling that the self help practice of blocking traffic to local exchange carriers (“LECs”) allegedly engaged in traffic pumping was unjust and unreasonable in violation of § 201(b). *See Establishing Just and Reasonable Rates for LECs*, 22 FCC Rcd 11629, 11631 (WCB 2007). However, the Commission has never declared that the self help practice of withholding payment of the tariffed charges of LECs allegedly engaged in traffic pumping would violate § 201(b). Unless that particular self help practice was held to violate § 201(b) by the Commission, Beehive could not bring a suit against Sprint in federal court under § 207 for the recovery of damages caused by its practice of withholding payment of Beehive’s tariffed access charges. Consequently, Beehive’s informal complaint for a declaratory ruling was at most an attempt to obtain the “predicate determination by the Commission of a regulatory violation” for which “a private right of action is authorized by § 207.” *North County*, 594 F.3d at 1160 n.10 (quoting *APCC*, 489 F.3d at 1250). In effect, Beehive was attempting to create a right of action against Sprint for damages under § 207. *See id.* Because the Commission did not issue the predicate declaratory ruling, and inasmuch as Beehive explicitly eschewed a damages

claim,<sup>40</sup> Beehive's informal complaint for declaratory relief could not be functionally equivalent to a request for damages for the purposes of § 207.

Finally, a failure to pay tariffed access charges is not prohibited by the Act and it has not been declared to be unlawful by the Commission. Because the private right of action created by §§ 206 and 207 extends only to violations of the Act and the Commission's implementing regulations, Beehive's suit against Sprint to recover unpaid tariffed charges could not be brought in federal court under § 207. However, Beehive's collection action was subject to the court federal question jurisdiction under 28 U.S.C. §§ 1331 and 1337.<sup>41</sup> If Beehive was not afforded the option of bringing its collection suit against Sprint in federal court pursuant to § 207, how could the election-of-remedies provision of § 207 possibly bar Beehive's district court action to recover its unpaid access charges?

Respectfully submitted,



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<sup>40</sup> See Lukas Decl. at 21.

<sup>41</sup> See Petition at 10-11.